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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| DONALD M. DE GUTZ,<br>Plaintiff and Respondent,<br>v.<br>RENE G. BOISVERT et al.,<br>Defendants and Appellants. | A126839<br><br>(Alameda County Super. Ct. No. RG08372963) |

Defendant Rene G. Boisvert, appearing in propria persona, appeals from a judgment after bench trial in favor of plaintiff Donald M. De Gutz. Boisvert seeks reversal of the judgment on five grounds. De Gutz, also appearing in propria persona, opposes each ground and urges affirmance. We affirm the judgment.

At the outset, we note that both parties are appearing in propria persona Defendant requests that we liberally construe his briefs based on the United States Supreme Court recognition, in *Hughes v. Rowe* (1980) 449 U.S. 5, that allegations stated in a prisoner complaint filed in propria persona in federal court, however inartfully pleaded, should be held to a less stringent standard than formal pleadings drafted by lawyers. (*Id*. at p. 9.) These are not the circumstances before us. Nor do the other federal cases cited by defendant persuade us that we should do anything other than what our own long-standing state law calls for in the circumstances before us.

That is, "[w]hen a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations]. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an

attorney [citation]." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639, followed in *County of Orange v. Smith* 132 Cal.App.4th 1434, 1444, *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125-1126; accord, *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1, *Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267.)

Accordingly, we follow herein certain guidelines regarding factual and legal assertions by both parties. Regarding factual assertions, we disregard any that are not supported by a citation to the record. " ' "It is the duty of the party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations." ' " (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.) "Upon the party's failure to do so, the appellate court need not consider or may disregard the matter." (*Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826, fn. 1 (*Regents*); *In re S.C.* (2006) 138 Cal.App.4th 396, 406-407.)

Furthermore, we disregard factual assertions based on information that is not in the record before us. "A reviewing court must accept and is bound by the record before it [citations], cannot properly consider matters not in the record [citations], and will disregard statements of alleged facts in the briefs on appeal which are not contained in the record." (*Weller v. Chavarria* (1965) 233 Cal.App.2d 234, 246 (*Weller*), cited in *In re Stone* (1982) 130 Cal.App.3d 922, 930, fn. 9 [determining that a transcript that was not offered in evidence before the trial court was "clearly outside the scope of our review"].)

Regarding legal assertions, we treat as waived arguments that are not supported by citation to supporting authorities. " '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' " (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*).)

Furthermore, we will not consider legal arguments based solely on conclusory citations. "An appellate court is not required to consider alleged errors where the appellant merely complains of them without pertinent argument" (*Strutt v. Ontario Sav. & Loan Assn.* (1972) 28 Cal.App.3d 866, 873 (*Strutt*)), including when "the relevance of

the cited authority is not discussed or points are argued in conclusory form." (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*).)

Finally, we note that " '[a] judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Appellant has the burden of affirmatively showing any error. (*Lennane v. Franchise Tax Bd.* (1996) 51 Cal.App.4th 1180, 1189.)

## RELEVANT BACKGROUND

In February 2008, plaintiff filed a complaint against defendant that is not contained in the record before us. Plaintiff filed a first amended complaint in March 2008 against defendant, as well as against the Rene G. Boisvert Revocable Trust and Rene G. Boisvert, Inc., doing business as Boulevard Equity Group (neither of which are parties to this appeal), alleging claims of breach of contract, breach of fiduciary duty, rescission, unjust enrichment, and negligence.[1]

Defendant filed a cross-complaint that is not at issue on appeal.

### *The Evidence Presented at Trial*

The following facts are based on the evidence presented at trial, which began at the end of August 2009. We disregard defendant's characterization of the problems with the trial evidence as stated in his opening brief because he either provides no record citations for his assertions (*Regents*, *supra*, 122 Cal.App.4th at p. 826, fn. 1) or bases them on "facts" that are not included in the record before us. (*Weller*, *supra*, 233 Cal.App.2d at p. 246.)

In 2004, defendant created 82nd Avenue LLC to own and operate a real estate project at the corner of 82nd Avenue and A Street in Oakland, California. Defendant improved four lots with a factory built home and subsequently marketed the properties at $498,000 each. In October 2006, defendant approached plaintiff, a long-time friend, and asked him to purchase the first of the four homes, on 8208 A Street (property), to help

[1] At trial, the court allowed plaintiff to amend the complaint to include a cause of action for fraud to conform to the proof.

defendant market the properties. Plaintiff testified that he agreed to do so based on his friendship with defendant, and understood from their discussions that his purchase would be risk-free and that he would receive a fee for his help.

Plaintiff testified that he was an engineer with no background in finance or business, had never invested in real estate and, before the subject transaction, had owned only one residence. Defendant testified that in the previous 10 years, he had "done a number of things." He continued, "I have done real estate projects which include mortgage brokering. I've done mom and pop development. And I've done very occasional transaction brokerage. I consulted in the sport and entertainment and nonprofit work."

In November 2006, the parties executed a one-page written agreement drafted by defendant. The agreement lists three goals of the transaction: to free up working capital, to encourage sales momentum in the local marketplace, and to establish market values. Defendant agreed to pay plaintiff $1,500 immediately following close of escrow on plaintiff's purchase of the property. He would provide plaintiff four months of advance mortgage payments, payable immediately following the close of escrow, and payment of property taxes and insurance payments as needed. Defendant also agreed that plaintiff was to always have a minimum of three mortgage payments in hand, and advances to replenish this minimum were to be made by the defendant on a monthly basis. Defendant would also make additional payments as required "to ensure that there will be no tax-negative consequence to [plaintiff] for his participation in this transaction." In addition, defendant assumed responsibility for the maintenance, utilities, and repair costs of the property.

Plaintiff agreed to provide his financial and credit resume, as well as any supporting documentation needed to complete the purchase. Plaintiff agreed to pay the mortgage, taxes, and insurance on a timely basis, and to execute the necessary documentation for re-sale of the property.

The agreement stated that defendant was engaging plaintiff "to temporarily purchase" the property. It further stated that the property would be immediately placed

back on the market to be re-sold. Defendant further agreed that, if the property was not re-sold within five months of the close of escrow, he would, at plaintiff's request, purchase it from plaintiff at the original purchase price plus all closing costs.

Defendant and plaintiff were listed as parties to the agreement. Defendant acknowledged in the agreement that the property was an asset of 82nd Avenue LLC, which in turn was an asset of the Rene G. Boisvert Revocable Trust. The agreement further stated that, according to the terms of the trust, the acting trustee had the continuing responsibility to pay out obligations of the trust or estate to the same extent as defendant under the agreement. The agreement was executed by defendant and plaintiff.

After the agreement was executed, defendant drew up an offer and acceptance agreement for the property, which listed defendant as the agent for both the buyer, who was plaintiff, and the seller. The purchase price was set at $510,000 by defendant based on an appraisal, without any negotiation with plaintiff. To pay this purchase price, defendant arranged loans for plaintiff from Chase Bank for $357,000 and from GMAC for $102,000, for a total in loans of $459,000. Plaintiff was required to pay about $51,000 as a down payment to secure the loans, which defendant promised to pay back to him within four or five days. In exchange for paying the down payment up front, defendant agreed to raise plaintiff's fee from $1,500 to $3,000. After the loans were secured, the seller's closing statement, which plaintiff did not receive, showed that the majority of the proceeds from the sale went directly to pay certain lenders, defendant received $157,953, and a $14,940 broker commission was paid to the Boulevard Equity Group.

Defendant paid plaintiff the amount of his down payment and his $3,000 fee. In February 2007, defendant provided four months of advance mortgage payments in the amount of $3,136 a month. In the following months, plaintiff received sporadic payments from defendant to pay for the property's mortgages. By October, plaintiff had exhausted the last of the mortgage payment reserves provided by defendant. Meanwhile, defendant sold two of the other four homes in the project.

In late October 2007, plaintiff and defendant met to discuss the issues between them. At the meeting, plaintiff learned defendant had taken the property off the market and demanded defendant buy the property back according to the terms of their agreement. Defendant declined to do so and suggested several alternatives, none of which was acceptable to plaintiff.

In the latter part of 2007, defendant presented plaintiff with two offers from third parties to lease the property with an option to buy after six months. Plaintiff rejected these options. He testified that he had no intention to rent the property. He had been advised by a realtor that new and unlived-in homes carried a higher sales value than homes that had previously been rented out and that it was difficult, if not impossible, to evict a tenant in Oakland for the purpose of trying to sell a property.

Plaintiff paid the mortgage payments for November and December 2007 out of his own funds, and met with defendant again in December 2007 to discuss defendant's failure to fulfill their agreement. In January 2008, defendant paid plaintiff $13,607.44 for payments made by plaintiff, but did not supply a reserve of mortgage payments. This was the last payment made by defendant to plaintiff. Plaintiff continued paying insurance premiums and taxes on the property, but ceased making mortgage payments; he had lost his job and could not afford to do so, and the house was "underwater."

In February 2008, plaintiff filed his complaint. He testified that he negotiated an agreement with GMAC that allowed him to satisfy the full balance of his loan for $10,000 in cash. However, the other lender, Chase Bank, had scheduled a foreclosure sale of the property to occur in late September 2009 (which was in the future at the time plaintiff testified).

At trial, Zachary Epstein testified for plaintiff as a qualified expert in tax issues and cancellation of debt. Epstein testified that as a result of the negotiated disposition of the GMAC loan, he projected that defendant would incur $37,355 in added income tax liability for 2008 based on the amount of debt cancelled by this disposition, which was taxable as ordinary income. Epstein further projected that as a result of the impending foreclosure sale by Chase Bank, plaintiff would incur an additional $91,587 in added

income tax liability in 2009. He calculated this amount based on the expected, taxable cancellation of the debt amount of $227,000, which was the difference between the appraised value of the property, $130,000, and the outstanding debt plaintiff owed on the loan, $357,000. In short, Epstein projected plaintiff's total income tax liability for 2008 and 2009 to be $128,942 as a result of plaintiff's involvement in the property.

On cross examination, Epstein testified that, in his opinion, no exception to the tax liability he projected would be incurred by plaintiff applied under the circumstances. Epstein said that he had found no evidence the property was used in a trade or business. He further testified that there had not been an effort to rent, nor a renting, of the property.

Epstein also testified that he considered plaintiff's purchase of the property as investment property. However, he was unsure who would be entitled to reduce tax liability based on the resulting capital loss, plaintiff or defendant. He opined that, if plaintiff were able to do so, he would only be able to reduce his tax liability by approximately $1,010.

Defendant contended that his arrangement with plaintiff amounted to an unwritten lease agreement and that money he paid to plaintiff was rental income. Defendant sought to have admitted a tax document, referred to as a "1099," related to his contention, which document he said he had submitted to the Internal Revenue Service (IRS) after creating it "in the last couple of weeks." The trial court refused to admit the evidence because of its late creation. The court subsequently admitted into evidence the document at plaintiff's counsel's request for the limited purpose of showing it had been created in the last couple of weeks.

Defendant attempted to provide expert testimony from a witness, James Shum. However, upon objection from plaintiff's counsel, the court ruled that Shum could not testify as an expert witness because defendant had failed to designate him as an expert witness at trial pursuant to Code of Civil Procedure section 12034; however, the court allowed Shum to testify as a rebuttal witness regarding Epstein's testimony. Shum did not provide any testimony that contradicted Epstein's factual assertions.

### *The Judgment*

Following arguments, the court took the matter under submission and eventually issued judgment in favor of plaintiff on breach of contract, breach of fiduciary duty, and fraud.

Regarding breach of contract, the court found that plaintiff and defendant had entered into a contract for the purchase and re-sale of the property and that defendant had breached this contract by failing to repurchase the property. As a result, plaintiff was entitled to $17,850.56 for expenses he incurred to maintain the property, $37,355.00 in increased tax liability for 2008, and $91,587.00 in increased tax liability for 2009, for a total of $146,792.56 in breach of contract damages. The court also found that Rene G. Boisvert Revocable Trust and 82nd Avenue LLC were liable for these damages as well.

Regarding breach of fiduciary duty, the court found that defendant "was and is a real estate broker, as were the companies he wholly controlled, Rene G. Boisvert, Inc., and Rene Guy Boisvert LLC,[2] both of which did business under the name Boulevard Equity Group." The court found that defendant and these codefendants acted as brokers for plaintiff in his purchase of the property and had a fiduciary duty to him that they breached by setting up a transaction that was established to serve defendants' purposes only, provided minimal benefit to plaintiff, and exposed him to the very risks that ultimately occurred. The court further found that these defendants knew or should have known, yet concealed from plaintiff, the risks involved, and that they "concealed the fact that [defendant] was unable to live up to the promises that were embodied in the contract entered into with plaintiff." Furthermore, after completing the sale of the property to plaintiff, defendants focused their efforts on selling two of the other properties in the project rather than reselling plaintiff's property, which re-sale would reap no advantage to defendants. The court found defendants "put their own ends above those of plaintiff, to whom they owed a fiduciary obligation."

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[2] The court allowed plaintiff to amend his complaint to add Rene G. Boisvert LLC as a defendant.

Furthermore, the court found that defendants took a "secret profit" of $14,940 in the form of a real estate commission, which was not disclosed to plaintiff. The court concluded this brokerage commission caused damages to plaintiff because it "had the effect of inflating the purchase price, and thus the loan obligation incurred by plaintiff." As a result of these defendants' breach of fiduciary duty, the court found plaintiff was entitled to the $146,792.56 in damages outlined in the court's breach of contract findings, and to recover the "secret profit" of $14,940, for a total of $161,732.56 in damages.

Regarding fraud, the court found that defendant, on behalf of himself and as agent for his co-cross-defendants, all of whom defendant completely controlled, intentionally misrepresented that they could and would live up to their obligations under the agreement between defendant and plaintiff, that he made these misrepresentations to induce plaintiff into the agreement, that plaintiff relied on them and that, as a result of defendant's fraud, plaintiff was entitled to the same amount of damages as those awarded for breach of fiduciary duty, $161,732.56. The court declined to award punitive damages.

Defendant filed a timely notice of appeal. While this appeal was pending, defendant moved to enlarge the record and/or for the matter to be remanded to the trial court, alleging that plaintiff's actual tax returns for 2008 and 2009 did not reflect the tax liability that plaintiff contended at trial he would likely incur. Plaintiff opposed the motion. We denied the motion. Defendant then filed an opening brief which nonetheless attached purported actual tax return information for plaintiff. Plaintiff moved to strike this opening brief, including because it cited to evidence not in the record, which motion we granted. Defendant subsequently filed an amended opening brief, which contains arguments that we now consider.

## DISCUSSION

Defendant asserts five grounds for reversal of the judgment. We conclude none of them provides a basis for any relief.

### I. *Defendant's Speculative Damages Claim*

Defendant first argues that the damages awarded to plaintiff for increased tax liability in 2008 and 2009, totaling $128,942, were improper because they were not

certain. Specifically, he argues that these damages were impermissibly speculative. He also argues that allowing the judgment to stand "based on erroneous hypothetical damages surely violates Due Process."

Defendant's arguments fail. He asserts that we are to conduct a de novo review because he has raised questions of law. We fail to see an argument about legal error, as opposed to one arguing that there was insufficient evidence of damages to support the court's judgment. As plaintiff points out, we review such an appellate claim based on a substantial evidence standard of review. (See, e.g., *Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 287 [evaluating whether expert opinion on future lost profits was substantial evidence].)

Regardless of the nature of defendant's argument, he does not establish any error of law. Civil Code section 3300 provides that, in the event of breach of contract, "the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) As both parties acknowledge, pursuant to Civil Code section 3301, "No damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and origin." (Civ. Code, § 3301.) As plaintiff points out, "[d]amages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." (Civ. Code, § 3283.)

While future loss must be shown to be "certain," it has long been established that this "requirement of certainty in respect to future damages . . . is satisfied by a showing of reasonable certainty that substantial future damages will result [citations], and the fact that the amount thereof may be difficult of exact admeasurement, or subject to various possible contingencies, does not bar a recovery." (*Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 745, cited in *Milton v. Hudson Sales Corp.* (1957) 152 Cal.App.2d 418, 435, *Allen v. Gardner* (1954) 126 Cal.App.2d 335, 341.) Furthermore, plaintiff does not dispute that " ' "damages which are speculative, remote, imaginary, contingent, or merely

possible cannot serve as a legal basis for recovery." ' " (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 473.)

Defendant does not contend, nor establish, that the trial court's rulings violated any of this law, or the related law regarding damages cited by plaintiff in his respondent's brief.

Defendant does argue that plaintiff's income tax liability damages were special damages that cannot be awarded under California law.[3] We are unpersuaded by his argument. As defendant alludes to by his quoting of *Hadley v. Baxendale* (1854) 156 Eng.Rep. 145 (*Hadley*), California follows the common law rule established in English courts that a party, along with assuming responsibility for general damages resulting from a breach of contract, "assumes the risk of special damages liability for unusual losses arising from special circumstances only if it was 'advised of the facts concerning special harm which might result' from breach" of contract. (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 969.) However, defendant ignores that it is also correct under California law that "[a]lternatively, the nature of the contract or the circumstances in which it is made may compel the inference that the defendant should have contemplated the fact that such loss would be 'the probable result' of the defendant's breach." (*Id.* at p. 970.)

Based on *Hadley*, defendant contends that plaintiff's IRS liability was a special circumstance for which he is not liable because it was not disclosed to him at the time the parties contracted. He states that "[t]he parties did not contemplate any IRS losses when the contract was made. A simple reading of the contract shows the parties specifically contemplated other expenses, losses, real estate taxes, but not internal revenue taxes."

There are several problems with defendant's argument. First, aside from his reference to *Hadley*, he fails to cite any relevant legal authority, let alone California law, that supports his argument. Second, he does not provide record citations for his factual

[3] Defendant does not establish that he raised this issue first before the trial court. Nonetheless, because plaintiff does not argue forfeiture of the claim for failure to first raise it below, we discuss its merits.

contentions. Therefore, we disregard his argument. (*Stanley, supra,* 10 Cal.4th at p. 793; *Regents, supra,* 122 Cal.App.4th at p. 826, fn. 1.)

Even if we were to consider defendant's argument, he fails to show why, under the circumstances, it cannot be reasonably inferred from the circumstances at the time of contracting that plaintiff faced a risk of significant tax liability in the event of defendant's breach. Given the nature of the parties' agreement about the property, which includes a reference to additional payments by defendant as required "to ensure that there will be no tax-negative consequence to [plaintiff] for his participation in this transaction," the understanding that plaintiff's purchase would be largely financed by $459,000 in loans, and defendant's own business experience, we see no reason why he should not have contemplated that tax liability for plaintiff would be a probable result of his breach.

Defendant further contends that plaintiff and his witnesses engaged in "impermissible speculation." He bases this on citations to the record indicating that "[p]laintiff's expert [Epstein] stated he was 'engaged to prepare actual tax returns' and later stated he 'prepared [plaintiff's] tax return for 2008.' Further, Epstein stated that the 'tax return . . . will (not) be changed in any way between now and October 15." Defendant does not explain why this establishes his claim of impermissible speculation.

On the other hand, plaintiff contends there was substantial evidence at trial that the damages awarded based on future tax liability were reasonably certain to occur in the future. Epstein testified as a qualified expert in tax issues that plaintiff would be liable for increased tax in 2008 and 2009 as a result of his purchase of the property. Epstein testified specifically that whether or not plaintiff chose to file his returns, the 2008 return reflected plaintiff's "actual tax liability" and the 2009 projections reflected the actual "tax consequences" of the transaction. We agree that this is substantial evidence supporting the court's findings.

In short, were we to consider defendant's argument, he gives us no legitimate reason to question the court's award of income tax liability damages in light of Epstein's testimony.

Defendant also provides no legal authority (other than a citation to a United Supreme Court case, which relevance he does not explain) or factual contentions for his due process argument. Therefore, we disregard it as well. (*Stanley, supra,* 10 Cal.4th at p. 793; *Regents, supra,* 122 Cal.App.4th at p. 826, fn. 1; *Strutt, supra,* 28 Cal.App.3d at p. 873; *Kim, supra,* 17 Cal.App.4th at p. 979.)

**II. *Defendant's "Improper Delegation of Duty" Claim***

Defendant next argues that the judgment below is improper because the court improperly delegated its duty to determine tax law to an unqualified expert, Epstein, and that later events demonstrated that the expert used the wrong IRS codes and regulations in his analysis. This argument is also unpersuasive.

Defendant presents a convoluted argument for which he provides few citations to legal authority, and those he does provide are federal law. He argues that the court allowed "erroneous testimony to be presented regarding the application of the [Internal Revenue Code] and regulations. Thus the court, not applying the correct law to the facts, . . . came to the conclusion that there was a future IRS liability." However, defendant, although he places some portions of his argument in quotations, does not cite to any relevant California legal authority in his opening brief, or identify any specific errors in the record made by the trial court, in support of his argument. Therefore, we disregard it. (*Stanley, supra,* 10 Cal.4th at p. 793; *Regents, supra,* 122 Cal.App.4th at p. 826, fn. 1.) Furthermore, he fails to explain the relevance of the federal law that he cites to the facts and circumstances of this case and, therefore, we disregard these arguments as well. (*Strutt, supra,* 28 Cal.App.3d at p. 873; *Kim, supra,* 17 Cal.App.4th at p. 979.)

Defendant also argues that the trial court "erred in applying its interpretation of the facts in this case but relegated this function as well as the application of the law to the 'expert' witness." Once more, defendant does not cite to any relevant California legal authority in his opening appellate brief, or identify any specific errors in the record made by the trial court, to support of his argument. Therefore, we disregard it. (*Stanley, supra,* 10 Cal.4th at p. 793; *Regents, supra,* 122 Cal.App.4th at p. 826, fn. 1.) He does quote a federal case regarding a tax court decision without explaining how it applies to the

present case and, therefore, we disregard this portion of his argument as well. (*Strutt, supra,* 28 Cal.App.3d at p. 873; *Kim, supra,* 17 Cal.App.4th at p. 979.)

In short, we find no merit in defendant's "delegation of duty" claim.

### III. *Defendant's "Fraud on the Court" Claim*

Defendant next argues that plaintiff and his attorney intentionally defrauded the court because "[p]laintiff and his attorney knew at the time of the trial that the plaintiff may file actual returns showing no tax liability. They wanted to keep this option open during the trial. The plaintiff did not file the returns for 2008 although they were due prior to trial. The only reason to introduce the proposed filings at trial was to establish an IRS liability and thus damages. Without this proposed liability there was no case! [Defendant] verily asserts that the plaintiff and his attorney together with their 'expert' knew or had reason to know that the plaintiff's actual returns might be different than those introduced at trial."

Defendant's argument is unpersuasive. While he supports it with a general discussion of the law regarding fraud on the court, he cites to nothing in the record in support of his factual contentions. Therefore, we disregard his argument. (*Regents, supra,* 122 Cal.App.4th at p. 826, fn. 1.) We note only that his argument is obviously premised on speculation in numerous respects, for which we have found no support in our review of the record before us. Epstein testified unequivocally that, regardless of what plaintiff chose to report on his taxes, his projections reflected plaintiff's "actual tax liability." Defendant provides no evidence that this testimony was fraudulent.

Defendant also cites to California Rules of Court Rule 8.252(c) and Code of Civil Procedure section 909 in a footnote, without further explanation. Therefore, we disregard these citations. (*Strutt, supra,* 28 Cal.App.3d at p. 873; *Kim, supra,* 17 Cal.App.4th at p. 979.)

In short, we find no merit in defendant's "fraud on the court" claim.

### IV. *Defendant's "No Resulting Damages" Claim*

Defendant next argues that plaintiff did not actually incur any damages because he has no IRS tax liability, nor did plaintiff incur any loss for any profits defendant might

have received from the underlying transaction. Once more, his arguments are unpersuasive.

Defendant makes no legal or factual assertions regarding plaintiff's tax liability, instead discussing the elements of fraud without explanation of their relevance. Therefore, we disregard his "no tax liability" argument. (*Stanley, supra,* 10 Cal.4th at p. 793; *Regents*, *supra*, 122 Cal.App.4th at p. 826, fn. 1; *Strutt*, *supra*, 28 Cal.App.3d at p. 873; *Kim*, *supra*, 17 Cal.App.4th at p. 979.)

Defendant also argues that plaintiff incurred no damages related to the "secret profit" of $14,940 in brokerage commission found by the court. According to defendant, the mere fact that he received this money did not establish loss or damages because, assuming the court was correct that the commission had the effect of inflating the purchase price, "there was no demonstrated loss. Ergo, no damages. Plaintiff never repaid, nor will he ever have to repay the money that came from the mortgage. The plaintiff never put any of his own money into the purchase of the home. Where is the loss?"

Defendant does not support his argument in his opening brief with citations to any evidence in the record or any case law showing that the trial court erred. For this reason alone, we disregard his argument. (*Regents*, *supra*, 122 Cal.App.4th at p. 826, fn. 1; *Stanley*, *supra*, 10 Cal.4th at p. 793.)

Even considering his argument, defendant ignores that one basis for the $14,940 damages award was that it was damages resulting from defendant's breach of fiduciary duty. As plaintiff points out, there is case law indicating that such secret profit by a fiduciary should be disgorged to the beneficiary. (See *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 14-15 [an undisclosed commission on a sale of property, taken in breach of a partnership agreement, had to be disgorged]; *Bank of America v. Ryan* (1962) 207 Cal.App.2d 698, 705-706 " '[w]here a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary,' " requiring that a bank officer disgorge a

commission to the beneficiary].) In light of this law, defendant fails to establish why his commission was not a proper subject of damages for his breach of fiduciary duty.

In his reply brief, defendant attaches a purported trial exhibit to his brief to contend that plaintiff knew at the time he purchased the property that Boulevard Equity Group was both the selling and buying broker of the transaction and, therefore, its participation was not a secret. Even accepting for the sake of argument defendant's exhibit and representation, this hardly matters; it was the commission, not the participation of any particular entity, that plaintiff testified he knew nothing about.

In short, we find no merit in defendant's "no resulting damages" claim.

## V. *Defendant's Pleadings Argument*

Finally, defendant argues that plaintiff's future income tax liability was not a proper subject for damages because it was not specifically pleaded in plaintiff's complaint or first amended complaint, which prevented him from presenting his own experts. This argument is also unpersuasive for at least two reasons.

Again, defendant cites case law that generally discusses rules about pleading without attempting to relate any of it to the present case (for example, citing *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1744 (discussing the need for pleadings to allege the cause of action shown by the evidence against defendant at trial). He does not identify any legal authority that supports his specific argument and, therefore, we disregard it. (*Stanley*, *supra*, 10 Cal.4th at p. 793; *Strutt*, *supra*, 28 Cal.App.3d at p. 873; *Kim*, *supra*, 17 Cal.App.4th at p. 979.)

Even if we were to consider defendant's argument, plaintiff alleged breach of contract caused damages to him because he was not reimbursed for, among other things, "tax and other payments [plaintiff] has made, and must continue to make," and that he was "further damaged in an amount in excess of $150,000, being the difference between the current value of the property and the amount plaintiff is liable for on the loans." Defendant then prayed for compensatory damages in excess of $150,000 as determined by proof, and for "any other relief which the court deems just and proper." Defendant fails to explain why this language is insufficient.

## VI. *Defendant's Reply Brief Arguments*

Finally, defendant raises numerous claims, issues, and arguments for the first time in his reply brief, including that 82nd Avenue LLC should be the only party to the judgment, that the other four parties should be excluded from the judgment, that 82nd Avenue LLC would stipulate to a judgment for the actual loss reflected in plaintiff's actual tax returns, that the $10,000 plaintiff paid to GMAC was an "elective payment" for which he should not be held liable, that he is at a minimum due a $52,150 "credit" from plaintiff, and that plaintiff was improperly awarded attorney fees because no document signed by the parties made any mention of attorney fees.

We do not consider any of the claims, issues, and arguments raised by defendant for the first time in his reply brief. "Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. To withhold a point until the closing brief deprives the plaintiff of the opportunity to answer it or requires the effort and delay of an additional brief by permission. [Citation.]" (*Campos v. Anderson*, (1997) 57 Cal.App.4th 784, 794, fn.3). Defendant does not provide any good cause for why he did not present these matters in his opening brief. Therefore we can, and do, disregard them.

## DISPOSITION

The judgment is affirmed. Defendant is ordered to pay plaintiff costs of appeal.

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Lambden, J.

We concur:

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Kline, P.J.

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Richman, J.